90-1166

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LONG ISLAND TYPOGRAPHICAL UNION
No. 915, CWA, AFL-CIO,

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violated a statute, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a law?

2. Whether a reviewing court may substitute its judgment for that of an arbitrator in order to increase a penalty meted out to an employee so as to ostensibly provide greater vindication of a public policy?

3. Whether the public policy against sexual harassment in the workplace is so overriding so that reviewing courts may carve an exception to the traditional policy against vacating arbitration awards?

LIST OF ALL PARTIES

1. NEWSDAY, INC. — Plaintiff-Appellee

2. LONG ISLAND TYPOGRAPHICAL UNION, No. 915, CWA, AFL-CIO* — Defendant-Appellant

3. NOW LEGAL DEFENSE AND EDUCATION FUND *ET AL* — *Amici Curiae*

4. *UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION* — *Amicus Curiae*

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* *There are no parent companies or non wholly owned subsidiaries that need to be disclosed.*

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	11
APPENDIX	12
COPY OF ORDER SOUGHT TO BE REVIEWED	A-1
COPY OF DISTRICT COURT ORDER	A-9

TABLE OF AUTHORITIES

CASES: **PAGE**

Amalgamated Transit Union v. Aztec Bus Lines,
654 F. 2d 642, 644 (9th Cir. 1981) 9

Delta Airlines v. Air Line Pilots Ass'n Int'l
861 F. 2d 665 (11th Cir. 1988) 5

Int'l Association of Machinists v. Campbell's Soup Company
406 F. 2d 1223, 1227 (7th Cir. 1909) 10

Iowa Elec. Lights & Power v. IBEW Local Union 204,
834 F. 2d 1424 (8th Cir. 1987) 5

Kane Gas Light and Heating Company v. Int'l Brotherhood of Firemen and Oilers Local 112,
687 F. 2d 673, 681-682 (3rd Cir. 1982) 8

Local 453 v. Otis Elevator Company,
314 F. 2d 25, 28 (2nd Cir. 1963) 10

Local 722 v. Children's Hospital,
117 LRRM 2486 (D.D.C. 1984) 8

Northwest Airlines v. Air Line Pilots Association
808 F. 2d 76, 83 (D.C. Cir. 1982) 6

Premium Buildings Products Company v. United Steelworkers of America,
616 F. Supp. 512, 516 (N.D. Ohio 1985) 8

PAGE

Stead Motors v. Automotive Machinists Lodge 1173,
886 F. 2d 1200 (9th Cir. 1989) 5

Super Tire Engineering Company v. Teamsters Local 676,
721 F. 2d 125 N.S. (3rd Cir. 1983) 6

United Paperworkers v. Misco,
484 U.S. 29 (1987) 5

STATUTES:

9 U.S.C. Section 10 .....2 & 5

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331 5

28 U.S.C. Section 1337 5

29 U.S.C. Section 185 5

Rule 56 of the Federal Rules of Civil Procedure 3

No.

IN THE

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PETITION FOR CERTIORARI

OPINIONS BELOW

To petitioner's knowledge, previous opinions rendered in this case have not been reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was entered on October 5, 1990.

2. No rehearing was requested.

3. This Court has jursidiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

The relevant statue is 9 U.S.C. Section 10. This statute provides:

> "In either of the following cases United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

STATEMENT OF THE CASE

This is an action commenced by respondent Newsday, Inc. on or about September 29, 1989. In this action, respondent sought an order vacating that part of the arbitration award which ordered that the grievant, William Waters, be reinstated to his former position without back pay. Subsequent thereto, petitioner Long Island Typographical Union No. 915 counterclaimed for an order (1) to confirm that part of the award which held that respondent discharged grievant without just cause and which ordered respondent to reinstate him; (2) to vacate that portion of the award which gave respondent the right to have grievant examined to determine whether he is medically fit to perform all the duties of his job; and (3) to make grievant whole for all losses that he suffered from the date that respondent failed to comply with the award, including all appropriate back pay and other benefits that grievant would have received but for respondent's failure to reinstate him, together with appropriate interest thereon.

Soon thereafter, respondent moved for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Respondent sought an order "Vacating, setting aside and declaring null and void the award of Arbitrator Adelman dated August 25, 1989, on the grounds that the award violates the public policy against sexual harassment, impermissibly amends and ignores provisions of the collective bargaining agreement which he was required to interpret, and ignores a precedential and binding prior arbitration award, thus exceeding his authority under the collective bargaining agreement."

Petitioner cross-moved for summary judgment pursuant to Rule 56. Petitioner sought an order confirming that part of the arbitrator's award which held that respondent discharged the grievant without just cause and which further ordered respondent to reinstate him. The cross-motion sought a further order for summary judgment pursuant

to Rule 56 vacating that portion of the arbitrator's award which gave respondent the right to have grievant examined to determine whether he is medically fit to perform all the duties of his job. In addition, petitioner sought an Order making grievant whole for all losses that he suffered from the date that respondent failed to comply with the award including all appropriate back pay and other benefits that grievant would have received but for respondent's failure to reinstate him, together with appropriate interest thereon.

In a Memorandum and Order dated February 6, 1990, the Honorable I. Leo Glasser granted respondent's motion for summary judgment and denied petitioner's cross-motion for summary judgment. In doing so, the District Court held that "The Court is driven to conclude that the arbitrator's award offends an explicit public policy that is clearly defined and readily found in statues, regulations and judicial decisions." The District Court held that the public policy offended by the award "is aimed at condemning sexual harassment in the work place."

The District Court continued:

> A clearer expression of a well defined public policy than is reflected in the foregoing statutes and judicial precedent will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated.

The District Court in the Memorandum and Order did not reach the other arguments advanced by respondent in support of its motion. Pursuant to the District Court's directive, the Clerk of the Court entered judgment in favor of respondent on April 11, 1989.

Petitioner, believing that the District Court erred in granting summary judgment to respondent, while denying it's cross-motion, duly appealed to the United States Courts of Appeals for the Second Circuit.

In a decision dated October 5, 1990, the Court of Appeals affirmed the District Court's Order. This decision was filled in the Office of the Clerk of the Second Circuit on October 5, 1990.

Petitioner now files the Petition for a Writ of Certiorari.

The basis for federal jurisdiction in the Court of first instance was under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, the U.S. Arbitration Act, 9 U.S.C. Section 10, 28 U.S.C. Section 1331; and 28 U.S.C. Section 1337.

ARGUMENT

The following discussion will reveal that this Petition should be granted because this action involves an important question of federal law which has not been, but should be, settled by this Court. Petitioner also respectfully submits that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings; or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

1. In *United Paperworkers v. Misco*, 484 U.S. 29 (1987), the Court specifically declined to decide the question whether "a court may refuse to enforce an award on public policy grounds only when the award itself violated a statute, regulation or other manifestation of postive law, or compels conduct by the employer that would violate such a law." *Id.* at 45 n. 12. Circuit Courts of Appeal since *Misco* have also declined to reach this question. *See Delta Air Lines v. Air Line Pilots Ass'n Int'l*, 861 F. 2d 665 (11th Cir. 1988); *Iowa Elec. Light & Power v. IBEW Local Union 204*, 834 F 2d 1424 (8th Cir. 1987); *but see Stead Motors v. Automotive Machinists Lodge 1173*, 886 F 2d 1200 (9th Cir. 1989).

The within action presents an opportunity for the Court to now address the issue since the issue was advanced by petitioner in the lower courts and apparently rejected by them. The issue is therefore ripe for review.

Review would also resolve conflicts between the Circuits on this issue. Prior to *Misco*, circuit courts did consider the issue. The Third Circuit held that public policy may be a ground for overturning awards "only if upholding an award would amount to 'judicial condonation' of illegal acts" and thus would "conflict directly with federal or state law." *Super Tire Engineering Company v. Teamsters Local 676*, 721 F. 2d 121, 125 n. 5 (3rd Cir. 1983) *citing Kane Gas Light and Heating Company v. Int'l Brotherhood of Firemen and Oilers Local 112*, 687 F. 2d 673, 681-682 (3rd Cir. 1982).

The District of Columbia Circuit in *Northwest Airlines v. Air Line Pilots Association*, 808 F. 2d 76, 83 (D.C. Cir. 1982) similarly ruled. There, the D.C. Circuit enforced an award reinstating an airline pilot who had been drinking alcoholic beverages immediately prior to a scheduled flight. The D.C. Circuit concluded that reinstatement was not against any public policy because the award itself did not violate established law or seek to compel some unlawful action.

In the case at bar, petitioner also argued that, in applying the public policy ground to an arbitration award, the court should apply the analysis which the Court in *Misco* specifically refused to reach, but which circuit courts did reach prior to *Misco*. The Second Circuit apparently refused to reach it as well. Specifically, petitioner had argued that enforcement of the award would not itself violate established law or compel an unlawful act.

Petitioner respectfully submits that this action presents an opportunity for the Court to now consider an issue which it has previously specifically refused to consider: Whether "a court may refuse to enforce an award on public policy grounds only when the award itself violated a statue, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a

law. *United Paperworkers v. Misco*, 484 U.S. at 45 n. 12. Review would also resolve a conflict between the circuit courts.

2. Petitioner also respectfully submits that the lower courts should not have substituted their judgment for that of the arbitrator in order to increase a penalty meted out to the grievant so as to purportedly provide greater vindication of a public policy interest. In doing so, the Second Circuit departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision.

Petitioner respectfully submits that merely because the grievant was not discharged, does not mean that the award itself was against public policy. Certainly, the arbitrator by effectively suspending the grievant without pay for in excess of one year, and by giving him a stern warning for the future, cannot be said to have condoned his behavior or to have violated the public policy against sexual harassment in the workplace. Respondent did not point to any authority which compels discharge under the facts of the within matter. As such, there was simply no need for the lower courts to substitute their judgment for that of the arbitrator in order to purportedly provide for a greater vindication of the public policy. The public policy interest has already been vindicated. Public policy did not mandate anything more. It certainly did not mandate the grievant's dismissal.

Under these circumstances, by increasing the penalty, the lower courts have effectively mandated that employees who stand accused of violating the public policy against sexual harassment in the workplace will have a more onerous burden in avoiding discharge than will those who stand accused of other infractions. Petitioner respectfully submits that the establishment of an across-the-board rule that grievant who stand accused of sexual harassment in the workplace must be dismissed would establish a dangerous precedent and must be clarified by this Court.

A review of a panoply of case law indicates that the federal courts have been extremely reluctant to increase a penalty to provide for a

greater vindication of a public policy. The lower courts by doing so herein, so departed from the usual course of judicial proceedings so as to warrant the exercise of this Court's supervision.

In order to fully explore these issues, it is illustrative to look to prior cases for guidance. In *Premium Building Products Company v. United Steelworkers of America*, 616 F. Supp. 512, 516 (N.D. Ohio 1985), the court confronted a similar claim. Plaintiff therein argued that the public policy was violated by the employee's reinstatement. The court rejected this assertion and defended the arbitrator's award:

> "In his view this conduct warranted serious discipline but was not just cause for discharge. This court cannot establish an across-the-board ruling that public policy requires that anyone caught smoking marijuana at their workplace is subject to discharge in all cases. This is not to minimize the seriousness of this offense which, this court would think, should be the subject of clear work rules dictating company policy."

The court in *Local 722 v. Children's Hospital*, 117 LRRM 2486 (D.D.C. 1984), considered the similar question and rendered a similiar decision. The facts in this case were somewhat akin to those herein. The employer sought to vacate an award which ruled that a discharge was not for just cause and which modified it to a thirty (30) day suspension. The employee, who is the subject of the award, had allegedly assaulted a patient in the hospital within which the employee worked. The employer asserted that such an award violated local public policy proscribing assault and battery and a hospital's duty to protect its patients. The court rejected this argument. It held that the local public policy against assault and battery and a hospital's legal obligation to protect its patients "does not mandate discharge as distinguished from some other penalty, and that overall, the national policy favoring resolution of labor disputes by arbitration requires confirmation of this award." *Id.* at 2487.

A similar result was reached in *Kane Gas Light and Heating v. Local 112*, 687 F. 2d 673 (3rd Cir. 1982). There the 3rd Circuit

refused to vacate an award reinstating an employee despite a public policy argument. The employer argued that reinstatement violated public policy where the gas company employee had turned off the company's main valve during a period of severe weather.

The court rejected this argument and held:

> "Here, however, it cannot be argued that enforcement of the arbitrator's award, which while reinstating Pritchard did provide for a penalty, would amount to 'judicial condonation' of illegal acts. The award does not let Pritchard's actions go unpunished; rather, it subjects Pritchard to a thirty day disciplinary suspension. The Company has not brought to our attention any federal or state law that would compel the harsher sanction of discharge no doubt because no such law exists. Thus, we conclude that the award here cannot be vacated on the ground that it is inconsistent with public policy."

A similar result was also reached in *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981). In this case, the court also refused to vacate an award reinstating an employee where a public policy argument was presented. There a bus driver was involved in a number of accidents and mishaps during his first year of employment. He was accused of improperly continuing to operate a bus. The employer, in seeking vacatur, argued that reinstatement was against public policy which frowned upon employing bus drivers who had previously shown bad judgment.

The court rejected the public policy argument. It noted that the arbitrator did not approve of the employee's conduct. The Court continued that the arbitrator "merely concluded that, under the circumstances, a two week suspension without pay rather than outright dismissal was an adequate sanction. Even if we agreed with the employer that a more severe sanction was appropriate, we are not permitted to review the merits of an arbitral award. Public policy should not be turned into a 'facile method of substituting judicial for

arbitral judgment'." Thus, the court refused to vacte the award of reinstatement.

A similar result was reached in *Int'l Association of Machinists v. Campbell's Soup Company*, 406 F.2d 1223, 1227 (7th Cir. 1969). There the court was called upon to review the propriety of an award which reinstated an employee who had been found to be engaging in gambling activities on the employer's premises. The court rejected the employer's public policy argument. In doing so, the court held "while we....cannot condone employee gambling activities on the employer's premises, we have been referred by Campbell to no federal policy that required the arbitrator, in exercising his lawful contract power, to approve the discharge of (the employee) or to compel the imposition of harsher sanctions than the award provided udner all the circumstances."

The Second Circuit is totally in accord with this line of cases. For example, the court in *Local 453 v. Otis Elevator Company*, 314 F.2d 25, 28 (2nd Cir. 1963), rejected an employer's public policy argument. In this case, the employer also argued that the public policy of the State of New York mandated that an employee who had been convicted of violating State gambling statutes could not be reinstated. However, Judge Marshall held:

> "Of course there is a public policy which condemns gambling by an employee on the premises of his employer; it is a policy expressed by the section of the New York Penal Law which Calise was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated, by a criminal conviction and the judicial imposition of a penalty. Parenthetically, it may further have been vindicated, beyond any demands of the State of New York, by the seven-month layoff without compensation or accrual of seniority benefits which Calise sustained and which the arbitrator upheld. *There is no federal policy that requires greater vindication of the public condemnation of gambling than this.*

> *The law is not that Draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation."* (Emphasis added).

Thus, the court refused to vacate the arbitration award which reinstated the employee despite the employer's public policy argument.

In summary, the public policy analysis cannot end with a determination of whether hostile environment sex discrimination violates public policy. Additional questions must be asked. These questions are whether the grievant's specific conduct violated an expressed public policy; whether the award itself violates public policy. All of these questions must be answered in the negative.

By ruling otherwise, the lower courts so deported from accepted judicial standards that this Court's intervention is required.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this court grant this petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEWSDAY, INC.,

Plaintiff,

v.

LONG ISLAND TYPOGRAPHICAL UNION NO. 915, CWA, AFL-CIO,

Defendant

CV-89-3228
MEMORANDUM AND ORDER

GLASSER, United States District Judge:

Plaintiff, pursuant to Rule 56, Fed. R. Civ. P., has moved this court for an order vacating and declaring null and void an arbitration award made by Richard Adelman, dated August 25, 1989, for the reasons that the award violates public policy against sexual harassment; is antagonistic to the terms of a collective bargaining agreement between the parties; ignores a prior arbitration award between the same parties concerning the same issue and exceeds his authority under the collective bargaining agreement.

The defendant cross-moved pursuant to the same Rule seeking an order confirming the award insofar as it determines that William Waters was discharged by the plaintiff without just cause and directs that he be reinstated; vacating that award insofar as it entitles the

plaintiff to have Waters examined to determine his medical fitness to perform the duties of his job, and for an order directing the plaintiff to reimburse Waters for the loss he sustained between the date of discharge and the date of reinstatement by way of back pay plus interest.

The statements of the parties submitted pursuant to Civil Rule 3(g) of this court, together with the attachments to their respective motions, readily permit the statement of the following uncontested issues of fact.

(1) William Waters was employed by Newsday from January 1968 until July 22, 1988 as a compositor in Newsday's composing room.

(2) On June 21, 1983, Waters was discharged for "disorderly conduct" in violation of Composing Room Office Rules. That conduct was offensive and unauthorized physical contact with female employees working in the composing room.

(3) On June 25, 1983 Waters was voluntarily reinstated. This discharge and reinstatement was grieved and arbitrated in November 1983 before George F. Sabatella who issued an award on February 23, 1984 sustaining the disciplinary action.

That award stated in part:

> Furthermore, I am also of the opinion the type and degree of misconduct which was the basis of Mr. Waters' disciplinary action can not in any way be tolerated in the work place for it disrupts and demoralizes the people functioning of a unit. Any action on the part of Mr. Waters which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leinency (sic).

(4) Mr. Waters was discharged again on July 22, 1988 for violating composing room rules in making unauthorized physical contact with different female editors working in the composing room.

(5) The defendant union grieved this discharge which was arbitrated before Richard Adelman at hearings on March 22, May 4 and May 25, 1989. The arbitrator's award, dated August 25, 1989, stated in part as follows (p. 7):

> It must be noted that the Union's contentions that the incidents involving Mr. Waters were minor in nature, and that Newsday used the incidents as a pretext for discharging an employee with a job guarantee, are rejected. As indicated above, the incidents were serious, and the type which Newsday has attempted, and properly so, to eliminate from its workplace. Moreover, the arbitrator's award in the earlier case referred to above stated "as this award pertains to Mr. Waters' conduct at the work place, any behavior consistent with the grounds of the grievance shall be the basis of his immediate discharge." Thus, Newsday's decision to terminate Mr. Waters surely was not pretextual, nor was it the result of an overreaction to the clear facts uncovered by Newsday's investigation.

The award continued as follows, on page 8 thereof:

> As noted above, the penalty issue is very difficult. The fact that Mr. Waters has engaged in similar conduct in the past for which he was disciplined is significant, especially considering the serious nature of his conduct. However, these offenses are not ones that call for immediate discharge; instead, such offenses call for the application of progressive discipline. In fact, progressive discipline was applied to Mr. Waters in 1983 based on his long record with Newsday, which now approaches some twenty years. Had Mr. Waters been

disciplined after the incidents either with Ms. May or with Ms. Beine, discharge might have been appropriate following the incidents with Ms. Coleman. Although upper management of Newsday cannot be blamed for the failure to impose any discipline on Mr. Waters as they were unaware of those earlier incidents, it would be inappropriate, and contrary to the concept of progressive discipline, to uphold the discharge of Mr. Waters. At this point, Mr. Waters must understand that he has engaged in conduct that is unacceptable in the workplace, that he is treading on dangerously thin ice, and that any similar offensive behavior shall be grounds for his immediate discharge.

Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitrator issues the following:

AWARD

The discharge of William Waters was not for just cause. Mr. Waters shall be reinstated without any back pay, but since he has not worked at Newsday for over a year, Newsday shall have the right to have Mr. Waters examined to determine whether he is medically fit to perform all the duties of his job. The period from the date of his discharge until the date of reinstatement shall be considered a suspension. It is so ordered.

The plaintiff filed a complaint with this court on September 27, 1988 seeking to vacate this award on the grounds that it was (1) irrational, (2) contrary to the collective bargaining agreement and a prior binding final arbitration and thus exceeded the arbitrator's authority, and (3) contrary to public policy. This motion for summary judgment followed.

For the reason which follow, the plaintiff's motion for summary judgment is granted and the defendant's cross-motion is denied.

The court is mindful of its limited function when the parties to a collective bargaining agreement have agreed to submit a disputed issue to an arbitrator. It is mindful that it may not reconsider the merits of an arbitrator's award even if it disagrees with the arbitrator's judgment. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

The court is also mindful, however, that it may refuse to enforce an arbitrator's award under a collective bargaining agreement because it is contrary to public policy. That is only to make specific application of the deeply rooted common law doctrine that contracts that violate law or public policy will not be enforced. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983). General considerations of a public interest that is only vaguely defined or reflects the court's unarticulated view of what that public policy is, will not suffice. The public policy that is offended must be "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

Upon the undisputed facts as previously stated, the court is driven to conclude that the arbitrator's award offends an explicit public policy that is clearly defined and readily found in statutes, regulations and judicial decisions.

The public policy offended by the award is aimed at condemning sexual harassment in the workplace and is reflected in Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2(a)(1) which makes it unlawful to discriminate against any person with respect to conditions of employment because of that person's sex. That general prohibition is elaborated in 29 CFR § 1604.11 as follows:

> (a) Harassment on the basis of sex is a violation of sec. 703 of Title VII. Unwelcome sexual advances,

> requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a....condition of an individual's employment,....or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

The inevitable consequence of the arbitrator's award which requires Newsday to reinstate Mr. Waters is to compel his female co-workers to submit to his sexual harassment (conduct of which he has been repeatedly adjudicated) as a condition of their employment and to permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment.

The depths to which these roots of public policy were intended to be planted is sternly expressed in 29 CFR § 1604.11(c), (d) and (f) as follows:

> (c) Applying general Title VII principles, an employer....is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.
>
> (d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Thus, subdivision (c) creates a species of strict liability upon an employer for the acts of sexual harassment by his supervisory personnel and subdivision (d) makes him responsible for such conduct by his employees unless he took immediate corrective action. Subdivision (f) directs an employer to "take all steps necessary to prevent sexual harassment from occurring, such as....expressing strong disapproval, developing appropriate sanctions...." The employer has attempted to comply with that direction. Indeed, in discharging Mr. Waters in 1988 it obeyed the direction of a prior arbitrator who, sensitive to the seriousness of sexual harassment in the workplace, stated that such continued misconduct "shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leinency (sic)." Sabatella Award, at p. 12.

The federal policy against sexual harassment in the workplace is mirrored in the statutes and regulations of the State of New York. *See* N.Y. Exec. Law § 291; New York State Division of Human Rights, Rulings, 8B State Fair Empl. Prac. Laws (BNA 455:3159 (1989).

The need to demonstrate judicial cognizance of the public policy against sexual harassment should not require citation beyond *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986) which leaves no doubt that sexual harassment creates a hostile and offensive workplace environment which Title VII was designed to eliminate. To paraphrase the court's observation in *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) to require a woman to run a gauntlet of sexual abuse as a condition of working is demeaning and disconcerting.

A clearer expression of a well defined public policy than is reflected in the foregoing statutes and judicial precedent will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated.

This motion for summary judgment is the appropriate procedural device for obtaining this result. Rule 56 of the Federal Rules of Civil Procedure must be applied with due regard for the right of a litigant to

demonstate, in accordance with the Rule prior to trial, that the defenses to his claim have no merit. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). There being no genuine dispute as to any material issue of fact and the plaintiff having demonstrated the merit of its claim and that the defense to it has no merit, its motion for summary judgment vacating the arbitrator's award is hereby granted. This determination makes moot the defendant's cross-motion which is, in any event, hereby denied.

SO ORDERED.

United States District Judge

Dated: Brooklyn, New York
February 6th, 1990

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1410 August Term, 1989
Argued: May 30, 1990 Decided: October 5, 1990

Docket No. 90-7236

NEWSDAY, INC.,

Plaintiff-Appellee,

- against -

LONG ISLAND TYPOGRAPHICAL UNION, NO. 915, CWA, AFL-CIO,

Defendant-Appellant.

Before: LUMBARD, KEARSE, and MINER, *Circuit Judges.*

Appeal from order of the District Court for the Eastern District of New York, Glasser, *J.*, granting summary judgment motion in appellee's action to vacate a labor arbitration award.

Affirmed.

BRADFORD W. COUPE, New York, N.Y. (Morgan, Lewis & Bockius, New York, N.Y.; D. Michael Underhill, Stephen A. Sola, Morgan, Lewis & Bockius, Washington, D.C., of counsel), for Plaintiff-Appellee.

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LUMBARD, *Circuit Judge:*

The Long Island Typographical Union No. 915 (the "Union") appeals from an order of the District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, which granted plaintiff-appellee Newsday, Inc.'s motion for summary judgment in Newsday's action to vacate a labor arbitrator's award. The challenged award ordered reinstatement of William Waters, whom Newsday had discharged for sexually harassing female co-workers.

We conclude that Judge Glasser properly vacated the arbitrator's award as violating the explicit, well-defined, and dominant public policy against sexual harassment in the work place.

I.

On or about September 27, 1989, Newsday commenced this action against the Union to vacate an award issued by labor arbitrator Richard Adelman on August 25, 1989. The arbitration had resolved a dispute between Newsday and the Union under their collective bargaining agreement; the award ordered the reinstatement of William Waters, who had been discharged by Newsday for sexually harassing female co-workers. The Adelman order reinstated Waters to his former position as a compositor, subject to a determination that Waters was medically fit to perform his duties.

Newsday sought vacatur of this award on three grounds: the award offended the well-defined public policy against sexual harassment in the work place; it exceeded the limits of the arbitrator's authority; and it failed to draw its essence from the parties' collective bargaining agreement.

The Union's Answer and Counterclaim opposed Newsday's attempt to vacate the award and requested a order vacating that portion of Arbitrator Adelman's award which made Waters' reinstatement contingent upon his passing a medical examination.

Newsday then moved for summary judgment. Thereafter, the Union cross-moved for summary judgment, seeking to confirm the award of reinstatement and to vacate portions of the award that permitted Newsday to condition Waters' reinstatement on a determination of medical fitness.

In an order dated February 6, 1990, Judge Glasser granted Newsday's motion and denied the Union's cross-motion. The Union appeals. We affirm.

II.

A. *Events Leading to the Adelman Arbitration*

Although it was Waters' sexual harassment of a female co-worker in July 1988 that catalyzed this lawsuit, the dispute between Newsday and Waters began on June 21, 1983, when Waters, a compositor at Newsday's Melville, New York facility since 1968, was discharged for "disorderly conduct" in violation of Composing Room Office Rules. On June 25, Newsday voluntarily reinstated Waters, but Waters and the Union filled a grievance against Newsday for the suspension. The issue was arbitrated before George F. Sabatella in November 1983.

On February 23, 1984, Arbitrator Sabatella issued an award sustaining the disciplinary action as not being in violation of the

parties' collective bargaining agreement. In his decision, Sabatella stated:

> certain female employees also working in the composing room have complained to Newsday management about Mr. Waters (sic) behavior. It appears that when Mr. Waters was occasioned to pass by these female employees certain "offensive and unauthorized contact" took place.

Although Sabatella determined that the award was non-precedent setting,[1] he stated:

> Furthermore, I am also of the opinion the type and degree of misconduct which was the basis of Mr. Waters; disciplinary action can not in any way be tolerated in the work place for it disrupts and demoralizes the people functioning of (sic) a unit. Any action on the part of Mr. Waters which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leinency (sic).

Waters was again discharged for disorderly conduct on July 22, 1988. The dispute over whether the discharge was for just cause was submitted to Arbitrator Richard Adelman who, in an opinion and award dated August 25, 1989, made factual findings that included the following: Late in the evening on July 7, 1988, Waters "brushed up against (a female co-worker's) lower back and upper buttocks," and then, ten minutes later, "slammed into her back" and "said, 'Excuse me!' in a tone that made (the co-worker) feel the contact was not accidental." The co-worker reported the incident to the Union and to

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[1] Sabatella's decision to issue a non-precedent setting award as between the Union and Newsday was in part due to the parties' collective bargaining agreement, which Sabatella found did not speak to the type of disciplinary action taken by Newsday in Waters' case.

Newsday. Newsday conducted an investigation of this complaint, which revealed two other incidents of alleged sexual harassment.

As described by Arbitrator Adelman, Waters approached a woman in the composing room in late 1983 or early 1984, "put his hand on her rib cage and starting moving it down towards her waist." The woman "grabbed Mr. Waters' hand and told him she would break his fingers if he ever did that again." Because the woman was a probationary employee at the time, she did not report the incident.

Another instance of harassment had occurred in the composing room in December 1986, when Waters "came behind (a female co-worker) and slapped her on the rear end." Several supervisors witnessed the incident, but the worker refused to report it because she was new in the composing room. In light of these incidents and Sabatella's warning in 1984, Newsday discharged Waters on July 22, 1988.

B. *The Adelman Arbitration*

In his opinion, Adelman rejected the Union's position that the three incidents never occurred, and found that they all happened as described in the testimony of Waters' co-workers. Adelman stated:

> (T)here is no doubt that the actions by Mr. Waters in moving his hand down (one co-worker's) back from her rib cage to her waist, in slapping, or patting, (another co-worker) on her rear end, and in slamming into (a third's) back was conduct that violated both the composing room office rules and Newsday's policy against "harassing, abusive or intimidating" behavior. This conduct was quite offensive to the women involved, and clearly constitutes harassment under Newsday's policy, as well as interference with "the business of the office" under the rules of the composing room.

With regard to the appropriate penalty, Adelman rejected the Union's contentions that the incidents involving Waters were minor in nature, and that Newsday used the incidents as a pretext for discharging an employee with a job guarantee. Adelman added that the incidents were serious, and of the type which Newsday has properly attempted to eliminate from its work place.

Nonetheless, Adelman decided that Waters was not discharged for just cause. Although Adelman found "(t)he fact that Mr. Waters has engaged in similar conduct in the past for which he was disciplined is significant, especially considering the serious nature of his conduct," he added, "these offenses are not ones that call for immediate discharge; instead, such offenses call for the application of progressive discipline." Adelman acknowledged that Waters had been subject to discipline in 1983; he state that if Waters had been disciplined after either of the two previously-unreported incidents, then discharge might have been appropriate following the 1988 incident. He concluded that it would be inappropriate and contrary to the concept of progressive discipline to uphold Waters' discharge. He stated:

> At this point, Mr. Waters must understand that he has engaged in conduct that is unacceptable in the workplace, that he is treading on dangerously thin ice, and that any similar offensive behavior shall be grounds for his immediate discharge.

Adelman ruled that Waters, upon passing a medical examination, should be reinstated without back pay.

C. *The District Court Decision*

Judge Glasser vacated Adelman's award of reinstatement, finding that it offended an explicit public policy condemning sexual harassment in the work place "that is clearly defined and readily found in statutes, regulations and judicial decisions." Specifically, Judge Glasser cited Title VII of the Civil Rights Act of 1964, 42

U.S.C.A. § 2000e-2(a)(1) (1981); federal regulations, 29 C.F.R. § 1604.11(c), (d), and (f) (1989); and New York State statutes and regulations. He also stated, "The need to demonstrate judicial cognizance of the public policy against sexual harassment should not require citation beyond *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986)."

Judge Glasser further ruled that the inevitable consequence of the arbitrator's award reinstating Waters would be to "compel his female co-workers to submit to his sexual harassment (conduct of which he has been repeatedly adjudicated) as a condition of their employment" and would "permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment." The court also recognized that the EEOC regulations direct an employer to take all steps necessary to prevent sexual harassment, and that Newsday had attempted to comply with that direction.

Judge Glasser opined:

> A clearer expression of a well defined public policy....will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated.

Accordingly, Judge Glasser granted Newsday's motion for summary judgment, vacating the Adelman Award, and denied defendant's cross-motion.

III.

A. *Review of the Arbitrator's Award*

As acknowledged by Judge Glasser, courts have a limited role when asked to review the decision of an arbitrator. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). Courts are not authorized to reconsider the merits of an award, as doing so would undermine the federal policy of settling labor disputes by arbitration. *Id.*

Nevertheless, a court may refuse to enforce an arbitrator's award under a collective bargaining agreement if the award is contrary to public policy. *Id.* at 42. This is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. *Id.* However,

> (A) court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.'"

Id. at 43 (emphasis in original) (quoting *W.R. Grace & Co. v. International Union of Rubber Workers, Local 759*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))).

B. *The Public Policy Against Sexual Harassment*

1. *Federal Statutes and Regulations*

The public policy against sexual harassment in the work place is well-recognized. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. 42 U.S.C.A. § 2000e-(a)(1) (1981). The Equal Employment Opportunity Commission, (the "EEOC"), which administers and enforces this provision, has promulgated a guideline stating:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when....(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or

> creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1989) (footnote omitted). In its Compliance Manual, the EEOC also has issued the following policy statement:

> (U)nwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance: Sexual Harasment, N-915.035, *reprinted in* EEOC Compl. Man. (BNA) N:4001, 4016 (Oct.25, 1988).[2]

Moreover, Title VII places upon an employer the responsibility to maintain a work place environment free of sexual harassment. The EEOC Guidelines make employers liable for sexual harassment between fellow employees of which it knew or should have known, "unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). The EEOC Guidelines indicate that employers should take all reasonable steps to prevent harassment from occurring in the employment setting, such as

> affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to senitize all concerned.

29 C.F.R. § 1604.11(f). The EEOC Compliance Manual further provides that employers should create a procedure for resolving

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[2] New York has similar legislation and rules. *See* N.Y. Exec. Law § 291 (McKinney 1982); New York State Division of Human Rights, *New York: Rulings on Pre-Employment Inquiries*, 8B State Fair Empl. Prac. Man. (BNA) 455:3151, 3159 (1989).

sexual harassment complaints that encourages victims of sexual harassment to come forward. *EEOC Policy Guidance, supra,* at N:4028. "It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation." *Id.*

2. *Case Law*

The public policy against sexual harassment in the work place similarly has been recognized by the courts. In *Meritor Savings Bank, FSB v. Vinson,* the United States Supreme Court held that a plaintiff may establish a Title VII violation by proving that discrimination based on sex has created hostile or abusive work environment. 477 U.S. 57, 66 (1986).[1] In so finding, the Court stated that the EEOC Guidelines, as an administrative interpretation of Title VII, "while not controlling....constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 65 (citations omitted). The Court Also stated that the EEOC Guidelines "drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

In sum, there is an explicit, well-defined, and dominant public policy against sexual harassment in the work place.

C. *Arbitrator Adelman's Award*

Adelman's award of reinstatement completely disregarded the public policy against sexual harassment in the work place. The arbitrator has also disregarded Sabetella's ruling that any further acts of harassment by Waters would be grounds for discharge. Instead,

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[1] Environmental work place harassment is harassment that is not directly linked to the grant or denial of an economic *quid pro quo*. *See Meritor Savings Bank, FSB*, 477 U.S. at 65. It is the type of harassment that occurred in the instant case.

Adelman's award condones Waters' latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. Waters has ignored repeated warnings. Above all, the award prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the work place.

In view of this conclusion, it is unnecessary to discuss the other points raised by the parties.

IV.

We affirm the district court's order, which granted Newsday's motion for summary judgment in its action to vacate Arbitrator Adelman's award of reinstatement.